Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems	)	MB Docket No. 04-207

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") hereby submits its views in connection with the Commission's inquiry concerning the provision of a la carte and tiered services on cable television and Direct Broadcast Satellite ("DBS") systems.[1] EchoStar is a multichannel video programming distributor ("MVPD") that provides hundreds of channels of digital television and other programming on its DBS system to over ten million subscribers throughout the United States.

MVPDs' flexibility to offer a la carte and tiered services is inhibited today by many factors. First and foremost among them is the practice of large media conglomerates of bundling their must-have programming, including in particular the local network broadcast stations and the most popular cable networks, with programming that consumers do not want. Faced with widespread bundling, MVPDs currently have little choice but to offer broad packages. So, while mandated a la carte requirements are certainly not the answer, the Commission has today the authority to facilitate such offerings by striking at the reasons that hamper them. This in turn could allow MVPDs the flexibility to craft package deals where they make economic sense and offer consumers the best value.

[1] *See* Public Notice, Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, DA 04-1454 (dated May 25, 2004) ("*Public Notice*").

Specifically, the bundling practices that have come to characterize the programming industry may have been encouraged in part by a misinterpretation of a Commission statement in the retransmission consent/good faith rulemaking – the statement that bundling requests are presumptively consistent with competitive marketplace considerations. This statement has been read by some programmers in a way that yields perverse results – as meaning that even conduct proscribed by the antitrust law's prohibition on tying is consistent with competitive marketplace considerations in the eyes of the Commission. The Commission should eliminate that presumption. At a minimum, the Commission should clarify that the presumption does not apply in the presence of market power. The Commission should also more proactively enforce its program access rules to limit practices such as unreasonable penetration requirements, which also constrain distributors' flexibility to offer a la carte or tiered services.

I. CURRENT STATUS OF DISTRIBUTORS' ABILITY TO PURCHASE PROGRAMMING ON A STAND ALONE BASIS

The *Public Notice* asks whether MVPDs currently have the option to purchase channels from programmers on a stand-alone basis such that the channels could be offered to consumers on an a la carte or specialized tier basis.[2] The reality is that the MVPDs are subject to bundling requests on the part of many powerful programmers. These requests could come in a variety of forms.

First is the bundling of retransmission consent for local network stations with carriage of unwanted programming. Thus, where an entity owns both local network stations and cable programming channels, the distributor may not be able to obtain retransmission consent for the entity's local network stations, which are a must-have to attract consumers and retain subscribers, without also agreeing to accept (and often pay for) the entity's often less popular cable

[2] *Id.* at 1.

channels. While at times an entity may offer retransmission consent for its local network channels on an ostensibly stand-alone basis, retransmission consent may be offered at a price that is many, many times the going rate for comparable local network stations. In such circumstance, accepting the bundle is the only real economically feasible alternative if the distributor is to be able to provide the local network station to its subscribers at a reasonable price.

Another possible brand of tying entails bundling by entities that own several cable networks, some of which are quite popular with subscribers. In this case, the programming vendor will not sell its very popular cable network to the distributor unless the distributor agrees to accept (and often pay for) a plethora of the vendors' other channels, which are often ones not popular with viewers.

Finally, many programming vendors make market penetration requirements a condition of selling programming to MVPDs. Such demands effectively impede the ability of MVPDs to offer channels to consumers on an a la carte basis. For example, a programming vendor might offer a distributor a popular cable channel on the condition that the channel be placed in one of the distributor's high penetration packages. This condition deprives the distributor of the flexibility to put the channel in a programming package with a lower market penetration or place the channel in its lineup with out regard to market penetration. Such penetration requirements are tantamount to an arbitrary assumption, imposed by the programmer, that many, perhaps millions, of subscribers that may not want this network do in fact want it. These requirements make a la carte or tiered offerings impossible with respect to the affected networks.

II. WHAT CONGRESS AND THE COMMISSION CAN DO TO FACILITATE VOLUNTARY A LA CARTE

As discussed above, EchoStar does not believe that pervasive government regulation is the answer to facilitating a la carte programming. Rather, the Commission can and should focus

its attention on the root cause of the factors that inhibit it, which is almost invariably the market power concentrated today in the hands of a few programmers and the incentive of cable-affiliated programmers to discriminate against non-cable MVPDs. The Commission already has at least some tools at its disposal to neutralize the effect of market power and other competitive distortions in the programming markets. Additionally, to help address situations where programming vendors may not necessarily have market power but nonetheless engage in bundling practices that inhibit the provision of a la carte programming, incentives should be considered to encourage vendors to make programming available on an a la carte basis.

A. The Good Faith Retransmission Consent Negotiation Requirements Should Be Enforced To Make Clear That Tying Coupled With Market Power Is Unlawful.

1. The Scope of the Good Faith Retransmission Consent Negotiation Requirement.

The good faith requirements of Section 325 of the Communications Act and the rules the Commission promulgated thereunder govern retransmission consent negotiations between MVPDs and programming vendors that own local network stations. *See* 47 U.S.C. § 325; 47 C.F.R. § 76.65. The Commission adopted a two-part test for assessing a network station owner's "good faith" in negotiating retransmission consent. Of particular relevance here is the "totality of circumstances test." Under that prong of the analysis, the Commission may find that a station owner breached its duty of good faith "based on the totality of the circumstances of the particular retransmission consent negotiation." 47 C.F.R. § 76.65(b)(2). Whether a specific demand violates the good faith obligation under the totality of circumstances is assessed with a view toward whether the demand is consistent with "competitive marketplace considerations." Demands that are consistent with competitive marketplace considerations are presumptively considered consistent with good faith obligations.

The Commission has specifically considered the propriety of tying arrangements and explained that while it presumptively views the conditioning of retransmission rights on the carriage of affiliated programming as consistent with "competitive marketplace considerations, proposals for retransmission rights that would "frustrate the functioning of a competitive market are not 'competitive marketplace considerations'" permissible under the statute. *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445 (2000), at ¶ 58. In particular, the Commission held that Section 325 of the Act does not permit "[p]roposals involving . . . carriage terms that result from an exercise of market power by a broadcast station . . . the effect of which is to hinder significantly or foreclose MVPD competition." *Id.*

Thus, the good faith statute already proscribes demands for retransmission consent carriage terms, including tying demands, that result from the exercise of market power. Unfortunately, however, the Commission's statement that tying is presumptively consistent with competitive marketplace considerations appears to have been misinterpreted by some programmers in an effort to whitewash even conduct that is prohibited by the antitrust laws. The Commission must abolish this presumption. At a minimum, the Commission must clarify that tying retransmission consent to carriage of other content is not permissible in the presence of market power.

2. Tying Coupled With Market Power Clearly Violates Antitrust Laws.

Precedent in the antitrust area instructs that tying arrangements harm competition because they "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market." *Northern Pacific Railway v. United States,* 356 U.S. 1, 6 (1958). Accordingly, such arrangements are *per se* unlawful under Section 1 of the Sherman Act, and thus

are prohibited without the need for proof of an unreasonable anticompetitive effect, if (1) there are two separate products with the sale of one being conditioned on the purchase of another, (2) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (3) a not insubstantial amount of interstate commerce in the tied product is affected. *See id.*, 356 U.S. at 5-6.

With respect to the first part of the unlawful tying analysis, the test for determining whether products are separate is whether the products are substitutable for one another, can be sold separately, and are subject to separate consumer demand. Broadcast station programming is not substitutable for cable programming, and vice versa. In a recent decision, for example, the Commission found that the markets that include video programming networks are "classically differentiated product markets," and can be separated into three broad categories: (1) national and non-sports regional cable programming; (2) regional sports cable networks; and (3) local broadcast television programming. *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News Corp.*"), at ¶¶ 59-60.

Likewise, to the extent there was any doubt about the market power of each major broadcasting network, the Commission has now settled definitively that question in the *News Corp.* decision: "News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations. Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult." *Id.* at ¶ 201. In addition, in evaluating EchoStar's recent antitrust complaint against Viacom, the federal district court for the Northern District of California stated from the bench that EchoStar's tying claims (which included its argument that Viacom

satisfies the market power prerequisite to a tying violation) had a substantial likelihood of success on the merits.[3]

Because the exercise of market power to tie retransmission consent to carriage of other stations already violates the antitrust laws, the Commission would be doing nothing novel by making clear that such conduct also violates the good faith statute. In this way, the Commission can use a tool already at its disposal to make it easier for MVPDs to obtain channels on an a la carte basis.

B. The Program Access Requirements Should Be Enforced To Make Clear That Bundling Of Cable Programming and Penetration Requirements By Vertically Integrated Vendors Violates The Program Access Law

As discussed above, another possible brand of tying involves programming vendors bundling together several non-broadcast networks. Here again, the Commission already has at its disposal at least a partial means to combat this type of bundling – when it is perpetrated by vertically integrated programming vendors. The "program access" law prohibits, among other things, vertically integrated "satellite cable programming vendors" from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers." 47 U.S.C. § 548(b). The program access statute also proscribes discrimination among MVPDs in the sale of satellite cable programming. 47 U.S.C. 548 (c).

Thus, where bundling or penetration requirements have the purpose or effect of hindering an MVPD's ability to compete, or are demanded on a discriminatory basis, the

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[3] *EchoStar Satellite L.L.C. v. Viacom, Inc.*, No. C 04-0049-CW (N.D. Cal. Feb. 27, 2004) (order denying continued temporary relief on other grounds). The dispute was eventually settled by the parties.

Commission should penalize this behavior. Such enforcement should help facilitate the availability of programming on a stand-alone basis.

Bundling could have the effect of significantly hindering an MVPD's ability to compete, for example where a programming vendor holds popular channels hostage to its demands that the MVPD also carry undesirable channels. As is the case with retransmission consent tie-ins, if the MVPD refuses to acquiesce, its alternative is not to carry the popular channel. Its ability to compete will surely suffer if there is no reasonable substitute for the channel.

Bundling demands and market penetration requirements would also violate the program access statute if made in a discriminatory fashion by vertically integrated programmers. For example, a vertically integrated programmer should not be permitted to force unaffiliated MVPDs to accept bundles or market penetration requirements the programmer does not require of its affiliated distributor. Enforcement of these prohibitions should help curb vertically integrated programmers' ability to force bundles and market penetration requirements on unaffiliated MVPDs, making it more likely that voluntary arrangements can be reached for a la carte programming.

C. Congress And The Commission Should Exhort Programmers To Alleviate Programming Requirements That Serve As Obstacles To A La Carte Offerings And Create Incentives For Programmers To Do So.

The fact that the Commission already has some tools at its disposal to help facilitate voluntary a la carte program offerings does not mean that there is nothing left for Congress and the Commission to do. The practice of bundling programming is entrenched in the industry and other measures more immediate than retransmission consent and program access complaints will be necessary to encourage programmers to move to a business model where there is a larger role for a la carte programming. Moreover, in the instances in which programmers' behavior cannot be reached through the complaint mechanisms discussed above, other incentives need to be created to motivate a movement toward a la carte models.

Congress and the Commission should affirmatively express their expectation that programmers will withdraw their insistence on carriage requirements that stand as obstacles to a la carte program offerings, and should consider a broad range of incentives to reward those programmers that demonstrate flexibility in this regard.

III. FACILITATING A FRAMEWORK FOR VOLUNTARY A LA CARTE ALLEVIATES CONSTITUTIONAL CONCERNS

The Commission has expressed concern regarding potential Constitutional issues that might arise from government action to facilitate a la carte programming.[4] But no Constitutional concerns will be presented if the measures recommended by EchoStar are adopted. First, EchoStar advocates recognition that some of programming vendors' tying behavior violates laws already on the books. Enforcement of these laws in a manner consistent with well-established antitrust precedent is in no way a novel interpretation of the laws, and raises no Constitutional implications.

Likewise, the creation of incentives to encourage programmers to offer channels on a stand-alone basis raises no Constitutional issues because no speech is compelled or prohibited by the government – programmers may avail themselves of the incentives on a purely voluntary basis.

With respect to other laws, the Commission has also asked whether the current must-carry requirements would prevent MVPDs from offering channels on an a la carte basis.[5] The answer to this question is clearly "no." The Commission has considered this issue in the context of satellite must-carry rules, and concluded that "we find nothing in [Section 338 of the Communications Act] that prohibits satellite carriers from offering local stations on an individual a la carte basis to the extent the carrier is not using this method of packaging to discriminate against local packaging." *In the Matter of Implementation of the Satellite Home Viewer Improvement Act*

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[4] *Public Notice* at 3-4.

[5] *See id.* at 3.

of 1999: Broadcast Signal Carriage Issues, Order on Reconsideration, 16 FCC Rcd. 16544 (2001), ¶ 46. Thus, the current must carry rules do not appear to stand as an obstacle to carriage of local channels on an a la carte basis, at least for satellite carriers.

IV. CONCLUSION

Certain programming vendors' tying demands coupled with their market power have inhibited a la carte program offerings by distributors. MVPDs currently have little choice but to distribute programming in broad packages. Mandated a la carte requirements are not the answer. Instead, the Commission should enforce the retransmission consent and program access laws, and Congress and the Commission should consider incentives to encourage voluntary a la carte offerings. These measures will strike at the market power that is at the heart of the market distortions that hamper a la carte while affording vendors and MVPDs the flexibility to craft package deals where they make economic sense and offer consumers the best value.

Respectfully submitted,

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